

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2020-224-C

IN RE:	Michael Madden,)	
)	
	Complainant/Petitioner,)	
)	
	v.)	RESPONDENTS' MOTION TO
)	STRIKE COMPLAINANT'S
	Charter Spectrum (Charter)	SURRESPONSE AND TO DISMISS
	Communications),)	AMENDED COMPLAINT
)	
	Defendant/Respondent)	

Pursuant to 10 S.C. Code Ann. Regs. 103-828 and 103-829 (2020), Rule 12(f), South Carolina Rules of Civil Procedure (“SCRCP”), and Rule 12(b)(1), SCRCP, Respondents Charter Fiberlink-SC CCO, LLC (“Charter Fiberlink”) and Charter Communications, LLC, d/b/a Spectrum, (“Charter Communications”) (collectively, “Respondents”) hereby move as follows:

- (1) To strike Complainant Michael S. Madden’s (“Mr. Madden” or “Complainant”) surresponse¹ to Respondents’ reply to Mr. Madden’s response to Respondents’ motion to dismiss, circulated by email on October 2, 2020, (the “Surreesponse”) because surresponses to a moving-party’s reply to a response to a motion are not provided for under Article 8, Chapter 103, S.C. Code of Regulations or the SCRCP.
- (2) To dismiss the complaint, as amended by Complainant’s Motion to Amend Complaint, dated October 8, 2020,² (“Motion to Amend”) for the reasons set forth in Respondents’

¹ The Surreesponse is styled “Reply to Respondents’ Reply to Complainant’s Reply to Motion to Dismiss” and was received from Mr. Madden via email on October 2, 2020 at 4:33 pm. As of this writing, the Surreesponse is not included in the digital docket and it’s unclear if it was ever filed with the Commission.

² Respondents do not contest Mr. Madden’s Motion to Amend but are aware that the Commission may strike proposed amendments to pleadings in its own discretion. 10 S.C. Code Ann. Regs. 103-829 (providing that the Commission may “[u]pon its own motion ... strike in whole or in part, any amendment [to the pleadings].”). For purposes of this motion, Respondents assume the Commission will grant Mr. Madden’s uncontested Motion to Amend.

Motion to Dismiss, dated September 21, 2020,³ and those herein because Mr. Madden's amended complaint only reinforces that this dispute relates exclusively to charges for Spectrum TV cable television services that are *not* regulated by the South Carolina Public Service Commission ("Commission").

Given the unmistakable law and indisputable facts in this matter, Respondents respectfully request that the above motions be granted without oral argument. *In Re: Robert B. Farmer – RBF Enterprises, LLC, d/b/a McDonald's v. Palmetto Wastewater Reclamation, LLC, d/b/a Alpine Utilities*, Docket No. 2013-119-S, Order No. 2016-34, p. 14 (S.C. Pub. Service Comm'n, Jan. 8, 2016) ("It is not a mandatory requirement that oral argument be held for every motion, which would violate the tenant of judicial economy and ignore the common practice of courts deciding matters based on the filings").

I. THE COMMISSION SHOULD GRANT RESPONDENTS' MOTION TO STRIKE SURRESPONSE BECAUSE SURRESPONSES TO A MOVING-PARTY'S REPLY TO A RESPONSE TO A MOTION ARE NOT PROVIDED FOR UNDER ARTICLE 8, CHAPTER 103, S.C. CODE OF REGULATIONS OR THE SCRCP.

Respondents understand that Mr. Madden is a *pro se* litigant, but respectfully note that 10 S.C. Code Ann. Regs. 103-829, governing motions before the Commission, provides for a motion, a response thereto, and a reply to the response. Neither Commission regulations governing practice and procedure nor the SCRCP provide for surresponses. Nor did Respondents raise any new issue in their Reply to Complainant's Response to Respondents' Motion to Dismiss that may justify Mr. Madden's Surreponse. *See, e.g., Mason v. AT&T Servs., Inc.*, No. 3:18-CV-00322-N (BT), 2019 WL 7667212, at *1 (N.D. Tex. Aug. 26, 2019) (interpreting similar federal procedure and concluding that "surreplies are 'highly disfavored' and permitted only in 'extraordinary

³ Respondents reassert and incorporate herein by this reference Respondents' Motion to Dismiss, dated September 21, 2020, as if fully set forth herein.

circumstances,’ such as when necessary to respond to new issues, theories, or arguments raised for the first time in a reply brief.”).

Instead, Respondents’ reply merely points out that Mr. Madden’s response did not challenge the evidence in Respondents’ Motion to Dismiss showing lack of subject matter jurisdiction, and otherwise failed to satisfy Complainant’s evidentiary burden to establish the Commission’s subject matter jurisdiction in this case. *See* (Respondents’ Reply to Complainant’s Response to Mot. to Dismiss, 2 – 3). For these reasons, Mr. Madden’s Surreponse should be struck as improperly submitted.

Regardless, the Surreponse does not provide any evidence tending to show the Commission has subject matter jurisdiction over this dispute. *See Hahn v. United States*, 313 F. App’x 582, 584 (4th Cir. 2008) (“The court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction”). Rather, the Surreponse reinforces the Commission’s lack of jurisdiction in this case by again complaining of bill changes tied to the provision of Spectrum TV services that are **not** regulated by the Commission.⁴ *See In Re: Savannah Valley Cablevision, Inc. v. West Carolina Rural Telephone Cooperative and West Carolina Communications, LLC*, Docket No. 2003-293-C, Order No. 2004-447, 9, 11 (S.C. Pub. Service Comm’n, Sept. 24, 2004) (noting that the Commission does not regulate “digital entertainment services” like cable television).

For example, in the Surreponse, Mr. Madden complains of a \$4.99 increase in his August 2020 Spectrum bill amount, (Surreponse at ¶ 4), but this was tied to a “Broadcast TV Surcharge” increase of \$2.95 due to increased “costs incurred from local Broadcast TV stations;” a \$1.50 increase for Spectrum TV select services; and an associated \$0.50 increase in taxes, fees, and

⁴ Nowhere in the Surreponse does Mr. Madden attempt to specifically tie any increase in his Spectrum bill amounts to public utility rates subject to the regulation, jurisdiction, and authority of the Commission.

charges.⁵ (Exh. B to Respondents' Mot. to Dismiss at 23 and 35). Mr. Madden was given advance notice of these changes on the face of his July 2020 Spectrum bill. (*Id.* at 23). Importantly, the "Broadcast TV Surcharge," as the name suggests, is tied *exclusively* to the provision of Spectrum TV cable television services that again are *not* regulated by the Commission. *See In Re: Savannah Valley Cablevision supra*; *see also* S.C. Code Ann. § 58-3-140(A) (limiting Commission authority and jurisdiction to public utilities).

Mr. Madden, on the other hand, argues in the Surreponse that because he purchased separate video, internet, and phone services from Charter Communications as part of a package that this somehow confers Commission authority and jurisdiction over each and every separate service included in the package, including video and internet services. *See* (Surreponse at ¶¶ 1, 6). This argument, however, is simply incorrect and without any foundation in law. *See In Re: Savannah Valley Cablevision supra*; *see also* S.C. Code Ann. § 58-3-140(A) *supra*.

Moreover, neither Charter Communications nor its affiliate, Spectrum Southeast, LLC, which provides video services to Mr. Madden and is not party to this case, are telephone utilities that directly provide telephone services subject to the Commission's regulation and jurisdiction.⁶ *See* S.C. Office of Regulatory Staff, Regulated Telecommunications Utilities, <https://ors.sc.gov/regulated-utilities/telecommunications> (last accessed September 28, 2020) (listing regulated telephone utilities in South Carolina).

⁵ Curiously, Mr. Madden also appears to complain about certain *decreases* in his Spectrum bill amounts in the Surreponse.

⁶ Spectrum Advanced Services, LLC, a separate corporate affiliate of Charter Communications, and not named as a party in this dispute, directly provides telephone services to Mr. Madden.

II. ASSUMING MR. MADDEN’S MOTION TO AMEND IS GRANTED, THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR THE REASONS SET FORTH IN RESPONDENTS’ MOTION TO DISMISS AND BECAUSE THE COMPLAINT, AS SO AMENDED, MERELY REINFORCES THAT THIS DISPUTE CONCERNS CHARGES FOR SPECTRUM TV SERVICES THAT ARE *NOT* REGULATED BY THE COMMISSION.

Assuming the Commission grants Mr. Madden’s uncontested Motion to Amend, the amended complaint must be dismissed for the same reasons set forth in Respondents’ Motion to Dismiss, dated September 21, 2020, and because the complaint, as so amended, only reinforces and affirms Respondents’ grounds for dismissal based on lack of subject matter jurisdiction set forth in their Motion to Dismiss. Mr. Madden asserts in his Motion to Amend that “the issue [in this case] involves certain bogus charges” that “stem from a so called Broadcast Surcharge Fee.” (Mot. to Am. Compl., ¶¶ 1 – 2). Mr. Madden then cites generally to the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A. §§ 521 to 611) (the “Cable Act”). (*Id.* at ¶ 3). While it’s unclear precisely what Mr. Madden seeks to assert by citing to the Cable Act, presumably it’s that Charter Communications’ Broadcast TV Surcharges are somehow impermissible under federal law.

Mr. Madden’s assertion that the issue in this case “stem[s] from a so called Broadcast Surcharge Fee,” (Mot. to Am. Compl., ¶ 2), only reinforces the grounds for dismissal in Respondents’ Motion to Dismiss for lack of subject matter jurisdiction. Indeed, the “Broadcast TV Surcharge” is tied *exclusively* to the provision of Spectrum TV cable television services. As explained on the face of Mr. Madden’s July 2020 Spectrum bill, these surcharges may change from time-to-time due to, for example, increased costs incurred from local Broadcast TV stations. (Exh. B to Respondents’ Mot to Dismiss at 23). Spectrum TV charges for the provision of cable television services, however, are *not* subject to Commission jurisdiction or regulation. For these reasons alone, this case must be dismissed. *See In Re: Savannah Valley Cablevision supra* (noting

that cable television services are not regulated by the Commission); *see also* S.C. Code Ann. § 58-3-140(A) (limiting Commission authority and jurisdiction to public utilities).

Moreover, the Cable Act relied on by Mr. Madden apparently for the proposition that Charter Communications' Broadcast TV Surcharges are somehow unlawful under the act (they are not) is federal law enforced through Federal Communication Commission ("FCC") regulations promulgated thereunder. *See generally In the Matter of Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992 Rate Regulation*, 8 F.C.C. Rcd. 5631 (1993). The Commission, however, is not given authority and jurisdiction to enforce the federal Cable Act against cable television service providers. *See* S.C. Code Ann. § 58-3-140(A) (limiting Commission authority and jurisdiction to the regulation of rates and services to statutorily defined public utilities operating in South Carolina).

At bottom, both Mr. Madden's Surreponse and Motion to Amend only reinforce and affirm that this case is exclusively about customer dissatisfaction with certain Spectrum TV charges. At no time was the price of Mr. Madden's voice service increased. (Exh. B to Respondents' Mot. to Dismiss at 3, 7, 13, 19, 23 and 35). The Commission, however, does not have the authority and jurisdiction to regulate charges for the provision of cable television services or to enforce the federal Cable Act. *See* S.C. Code Ann. § 58-3-140(A); *see also, In Re: Savannah Valley Cablevision supra*. Accordingly, the complaint, even if amended pursuant to Mr. Madden's Motion to Amend, must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth hereinabove and for those set forth in Respondents' Motion to Dismiss and the Reply in connection therewith, Respondents respectfully request as follows:

- (i) that the Commission grant Respondents' Motion to Strike Complainant's Surreponse without oral argument;
- (ii) that the Commission, assuming Complainant's Motion to Amend is granted, grant Respondents' Motion to Dismiss Amended Complaint without oral argument; and
- (iii) for such other and further relief as is just and proper.

Respectfully submitted,

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